No. 89-1229

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

Lori J. Jasso, Petitioner

v.

Sherry A. Finney and
Bruce F. Finney, Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

Sarah J. Tugman
TUGMAN, CLARK AND RAY
711 H Street, Suite 500
Anchorage, AK 99501
(907) 272-7989
Counsel for Respondents

QUESTIONS PRESENTED

1. Is the Indian Child Welfare Act, 25 U.S.C. Secs. 1901 et seq. (ICWA), constitutionally or statutorily applicable, and does a non-Indian have standing to raise it, in a state court dispute between two non-Indian parties, where no concrete injury is alleged, and where the application of the Act urged would result in the evil the Act meant to prevent?

2. Is a non-Indian, college-educated, surrogate mother, who consented to an adoption by her non-Indian sister of her sister's husband's child, entitled to vacate the adoption decree granted to her sister by a state court with jurisdiction, automatically and at any time she chooses, on the basis of a procedural error under ICWA, where no due process rights were violated and where no fraud or duress was involved?

3. Was the state court correct in noting applicability of ICWA, examining its intent, purpose, and language, following a long-respected line of cases from this Court, and applying a general residual state statute of limitations applicable to all attacks on adoption decrees; where although Congress considered application of state statutes of limitations to actions attacking adoption decrees, it did not establish a general federal statute of limitations for actions alleging such procedural errors; and where the state court's result avoided grave constitutional questions and effectuated the objectives of ICWA?

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PARTIES TO THE PROCEEDING

Bruce F. Finney, the source of Indian blood in this Indian Child Welfare Act [1] case, has not been identified by Petitioner as a party in this case. [2] He wishes to be, and properly is, a respondent here. The parties properly should be: Lori J. Jasso, Petitioner v. Bruce F. and Sherry A. Finney, Respondents.

JURISDICTION

No basis for the exercise of jurisdiction by this Court has been raised in the Petition. See Petition for Certiorari p. 1. Additionally, Petitioner lacks standing to raise the

1/ 25 U.S.C. Secs. 1901 et seq., hereinafter "ICWA" or "Act."

2/ He consented to the adoption of his child, T.N.F., by his wife, Sherry Finney (R. 149-50), and participated as a party at the trial court and at the Alaska Supreme Court.

questions presented to this Court. [3/] See pp. 11-15.

STATEMENT OF THE CASE

Respondents adopt the statements of the Alaska Supreme Court as to the facts of this case. [4/] Further facts which are pertinent to this Court's review follow.

The child, T.N.F., whose adoption is at issue here, is 1/64 Chickasaw Indian and is eligible for membership in the

3/ Petitioner's lack of standing was raised by Respondents below (Brief in Opposition below pp. 36-44).

4/ In the Matter of the Adoption of T.N.F., 781 P.2d 973 (Alaska 1989), Section 1 of the Majority Opinion at 974-75, and Concurring Opinion at 982-83. This case will be referred to as "T.N.F."

Chickasaw Tribe. [5/] T.N.F.'s Indian heritage comes to her solely through her father, Bruce F. Finney, with whom she lives.

Due to the surrogacy arrangement underlying this case [6/], the only Indian family that has ever existed is T.N.F.'s family with Bruce Finney, her father, and Sherry Finney, her father's wife. Sherry and Bruce Finney accepted custody of

5/ Membership in the Chickasaw Tribe may be issued to any person, no matter what degree of Indian blood, if that person is a lineal descendent of someone whose name appeared on the final roles of the Chickasaw Nation in 1906. Mr. Finney is an Indian artist, concerned with Indian themes in his work, and is proud of his heritage. He wrote to the Chickasaw Nation, established his lineage, and obtained a Certificate of Degree of Indian Blood. He is 1/32 Chickasaw Indian. (Letter to Alaska Superior Court Judge Victor Carlson from the Chickasaw Nation. R. 36).

6/ Petitioner bore Bruce F. Finney's child for her sister, Respondent Sherry Finney, as Sherry Finney was unable to have children of her own.

T.N.F., and all the obligations of parenthood, at the moment of her birth.

Petitioner is non-Indian. She is college educated and fully conversant in English, her native language. She seeks to vacate the decree of adoption granted to her non-Indian sister, Sherry Finney. Petitioner bases her belated attack on the adoption decree on a provision in ICWA. [7/] She relies solely on a procedural provision of the Act governing the manner in which consents to adoptions of Indian children are to be executed. [8/]

7/ Petitioner knew, at the time she consented to the adoption, of the child's Indian heritage (R. 1-2). She was also notified of, and raised no objection to, the fact that the attorneys filing the adoption paperwork for the Finneys were taking the position that ICWA did not apply to the adoption. T.N.F., 781 P.2d at 974.

8/ 25 U.S.C. Sec. 1913(a) provides that consents to adoptions of Indian children must be recorded before a judge of a court of competent jurisdiction and their terms and consequences explained by the judge in a language the consenter understands.

Petitioner executed a consent to the adoption in writing [9], which complied in all ways with Alaska law. [10] Petitioner did not assert below, and does not assert here, that she did not understand the simple, unambiguous consent that she signed or what adoption means. She conceded that neither fraud nor duress was used in obtaining her consent. T.N.F., 781 P.2d at 981 n.19. She never alleged that she would not have consented

[9] Petitioner's consent reads: "That [Petitioner] has read this document and fully understands that her consent to this adoption terminates her legal rights as the mother of [T.N.F.] and freely and voluntarily consents to this adoption." (R. 1-2.)

[10] A.S. 25.23.060 provides that consents may be executed in the presence of a court, or a notary public.

had she been in front of a judge. [11] She alleged only a procedural error under ICWA. [12]

The Chickasaw Nation was notified of the adoption proceedings in 1986 and raised no objection. In fact, on May 9,

[11] R. 13-21, 198-202. In the absence of any such allegation, in the trial court, during oral argument on Petitioner's motion to vacate the adoption decree, Petitioner's counsel could only argue: "None of us can look backwards in a crystal ball and exactly say what would have happened, we do not know. . . . Had she appeared in front of a judicial officer . . . she very well may have decided to the contrary" (R. Proceedings p. 18) and later: "She would at this point not give the consent of the adoption of the child" (R. Proceedings p. 30) (emphasis added).

[12] Although Petitioner now argues (Petition pp. 15-16) that her "actions regarding withdrawal of her consent were based on her knowledge of her rights under Alaska law," these allegations were not made, nor are they supported in the record below. Petitioner's argument also misstates Alaska law. See A.S. 25.23.070. In any event, 25 U.S.C. Sec. 1913(a) does not require that judges explain ICWA rights to withdraw consents. It requires only that a judge certify that the terms and consequences of the consent were explained and understood. 25 U.S.C. Sec. 1913(a).

1988, during the trial court proceedings on Petitioner's motion to vacate the adoption, Bill Anoatubby, Governor of the Chickasaw Nation, wrote to Alaska Superior Court Judge Victor Carlson stating:

> We appreciate the opportunity to help Mr. and Mrs. Bruce Finney in the matter of the adoption of [T.N.F.], a minor, No. 3AN-86-1331 Civil. . . . In the interests of both the child and of the tribe, we strongly encourage the court to recognize the need for this Indian child to remain with her Indian parent. Such is the original intent and the practical applications [sic] of the Indian Child Welfare Act, and the Chickasaw Nation requests that such recognition be afforded Mr. Bruce Finney in this instance.

(R. 36.)

T.N.F.'s Indian blood became a matter of concern to Petitioner after she was urged by the National Coalition

Against Surrogacy to get T.N.F. back. [13] She was told by its representatives, at least three months prior to the expiration of Alaska's one-year statute of limitations, that the adoption had been done "improperly." [14] Petitioner, however, did not take any legal action to withdraw her consent or upset the decree for five months from that time. She waited until 19 months after relinquishing custody, 17 months after consenting to the adoption, and 14 months after the final decree of adoption was entered, and only then moved to set it all aside.

[13] Petitioner has been appearing on television talk shows expressing her anti-surrogacy views (R. 96-97).

[14] Affidavit of Diane Knight (R. 192-94).

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS THE PETITIONER ASKS THIS COURT TO REVIEW ARE NOT PROPERLY PRESENTED BY THE FACTS OR IN THE RECORD BELOW.

A. THE UNUSUAL FACTUAL CIRCUMSTANCES UNDERLYING THE ALASKA SUPREME COURT OPINION MAKE THIS CASE AN INAPPROPRIATE VEHICLE ON WHICH TO BASE NATIONWIDE LAW ON INDIAN RIGHTS.

1. THE RELIEF PETITIONER SEEKS UNDER ICWA COULD LEAD TO REMOVAL OF AN INDIAN CHILD FROM AN INDIAN HOME WHERE SHE LIVES WITH THE ONLY INDIAN PARENT INVOLVED IN THIS CASE, THE EXACT EVIL THE ACT SEEKS TO PREVENT.

Petitioner, a non-Indian, seeks to take advantage of a procedural error under ICWA to upset the stability and security of a child's Indian home. [15] Ironically, under the "unique facts"[16]

[15] Petitioner now contends she wants only visitation rights. She has moved, however, for vacation of the adoption decree. If this decree is vacated under ICWA, the door is open, under 25 U.S.C. Sec. 1916(a), to removal of this child from her Indian home and sole Indian parent.

[16] T.N.F., 781 P.2d at 973.

of this case, the result Petitioner seeks to achieve through use of the Act would make a mockery of the Act and injure the very interests it was designed to protect.

Congress, in enacting ICWA, stated:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . .

25 U.S.C. Sec. 1902, Congressional Declaration of Policy. The Act clearly was not drafted to provide a non-Indian woman with a "vehicle" to further purposes which have nothing to do with Indian rights or welfare. [17/]

The dangers Congress feared and the

[17/] T.N.F., 781 P.2d at 983, Concurring Opinion of Justice Compton.

evils it sought to prevent [18/] are simply not present in this case. This is a dispute between two non-Indian sisters. It is not a case that warrants review by this Court on any issue of Indian rights.

2. PETITIONER LACKS STANDING TO RAISE ICWA COMPLAINTS HERE.

This Court does not have a "case" or "controversy" before it. Art. III, Sec. 2, U.S. Constitution. Petitioner has presented only a hypothetical case for this Court to decide. Petitioner argues that this Court should hear her case so as to protect the rights of isolated or

18/ 25 U.S.C. Sec. 1901, Congressional Finding (4):

> [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them . . . and an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes. . . .

disadvantaged Indian [19/] mothers who may, in the future, be encouraged to give up their children for adoption without understanding the terms in a written consent or the consequences of consenting to adoption. Petition, pp. 10 n.7, 12, 16-17. These hypotheticals do not reflect Petitioner's own circumstances. [20/]

19/ Petitioner's examples based on child rearing practices of the Chickasaws and other examples relating to Indian people are misplaced. She is a non-Indian, college educated, English speaking woman with no connection to any Indian tribe.

20/ R. 37-194. While the example set out on pp. 16-17 of the Petition presents a truly compelling set of facts, those facts are not present here. Petitioner was not a minor at the time she consented to the adoption. She was a 36-year old, non-Indian woman, with four children, and she was fully conversant in the English language. She signed a clear and unambiguous consent to the adoption of T.N.F. after the birth of T.N.F., not before. She was notified of the adoption hearing. T.N.F., 781 P.2d at 974. There is nothing in the record to show that she did not have the resources either to hire an attorney or to come to Alaska for the hearing.
(continued...)

Petitioner alleges the fact that her consent to adoption was not given before a judge. She has not alleged that this actually harmed her. She has not alleged that her consent was not freely and voluntarily given. She has not alleged that she did not understand its terms or its consequences. She has not suggested anything that a judge might have done that would have changed her decision to give her consent. R. 13-21, 198-202. See also, n.11 p. 6, supra.

Petitioner has not alleged, and the record does not support the conclusion, that she suffered a "concrete injury, . . . that indispensable element of a dispute which serves in part to cast

20/(...continued)
T.N.F. has not lost the advantage of Indian society. She lives with the only Indian parent involved in this case.

it in a form traditionally capable of judicial resolution." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220-21 (1974). For standing, Art. III, Sec. 2, requires more than "the remote possibility, unsubstantiated by allegations of fact" that the situation might have been better if things had been different. Warth v. Seldin, 422 U.S. 490, 507 (1975).

Absent an allegation that being before a judge would have made any difference, this case presents only an "abstract" question, and "it can only be a matter of speculation whether the claimed violation has caused a concrete injury to the particular complainant." Schlesinger, 418 U.S. at 223. Petitioner has failed to allege a factual basis granting her standing to come to this Court.

> It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Warth v. Seldin, 422 U.S. at 518.

Additionally, the protection Petitioner seeks is outside the "zone of interests" [21/] protected by ICWA. She has not suffered any harm which ICWA intended to prevent. "[N]othing [Petitioner] advances furthers the cause of Indian welfare." T.N.F., 781 P.2d at 983, Concurring Opinion of Justice Compton. Neither Petitioner, nor the National Coalition Against Surrogacy, is the right party to raise ICWA complaints.

21/ Assoc. of Data Processing v. Camp, 397 U.S. 150, 153 (1970); Allen v. Wright, 468 U.S. 737, 751 (1984).

B. THE SECOND QUESTION PETITIONER PRESENTS FOR REVIEW WAS NOT PRESENTED TO, OR DECIDED BY, THE TRIAL COURT OR THE ALASKA SUPREME COURT.

The Petition fails to comply with the mandates of United States Supreme Court Rule 21.1(h), 28 U.S.C.A. It fails to show that a "federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

The second question Petitioner presents to this Court was not raised in the trial court nor in the Alaska Supreme Court. [22/] The question is not open in

[22/] Appeal points listed by Petitioner did not include this question (R. 207-08), and it was not briefed or argued below. On appeal, Petitioner argued that it was the intent of the drafters of ICWA that there be no statute of limitations applicable to Sec. 1914 actions, or that the California statute of limitations should apply. She argued that the Sec. 1913(d) two-year time limit could not be applied; the opposite of what she argues here. If the issue can be considered raised in this manner, it was certainly raised and waived.

this Court where the question was not raised below. Ellis v. Dixon, 349 U.S. 458, 460 (1954).

II. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

A. THE ALASKA SUPREME COURT NOTED APPLICABILITY OF ICWA, EXAMINED ITS INTENT AND PURPOSE, FOLLOWED A LONG-RESPECTED LINE OF CASES FROM THIS COURT AND APPLIED THE CORRECT STATE STATUTE OF LIMITATIONS TO ICWA, WHICH IS SILENT ON THE QUESTION.

1. PETITIONER'S ARGUMENT THAT NO STATUTE OF LIMITATIONS APPLIES TO ACTIONS BROUGHT UNDER 25 U.S.C. SEC. 1914 IS NOT SUPPORTED BY THIS COURT'S DECISIONS OR BY THE ACT ITSELF.

It has long been the rule [23/] that where a federal act is silent as to a statute of limitations for a federal cause of action, the "most appropri-

23/ O'Sullivan v. Felix, 233 U.S. 318, 322 (1914); Chattanooga Foundry v. Atlanta, 203 U.S. 390, 397 (1906); Campbell v. Haverhill, 155 U.S. 610, 614, (1895); M'Cluny v. Silliman, 3 Pet. 270, 277 (1830).

ate" [24] or "most analogous" [25] state statute of limitations is borrowed unless there is a conflict with federal policy. [26]

> A federal cause of action "brought at any distance of time" would be "utterly repugnant to the genius of our laws." Adams v. Woods, 2 Cranch 336, 342, 2 L.Ed.2d 297 (1805).

Wilson v. Garcia, 471 U.S. 261, 271 (1985).

> Statutes of limitations. . . . have long been respected as fundamental to a well-ordered judicial system.

Board of Regents v. Tomanio, 446 U.S. at 487.

[24] Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

[25] Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980).

[26] Occidental Life Insurance Co. of California v. EEOC, 432 U.S. 355, 367 (1977).

The Alaska Supreme Court, guided by decisions of this Court [27], applied an Alaska state statute of limitations specific to attacks on adoption decrees. [28] The statute of limitations selected by the Alaska Supreme Court falls within the confines set out in recent decisions by this Court. Owens v. Okure, 109 S.Ct. 573, 580 (1989); Reed v. United Transportation Union, 109 S.Ct. 621, 630 (1989). The Alaska statute is a general, residual statute of limitations governing

27/ T.N.F., 781 P.2d at 978, 980.

28/ A.S. 25.23.140(b) provides:

> (b) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter. . . .

all attacks on adoption decrees. Its provisions are easily identifiable by language and application. [29/]

Congress was clearly aware of the fact that state law would apply to Indian adoptions. [30/] In fact, Congress considered the application of state statutes of limitations to attacks on state adoption decrees and established a federal limitation period for special

[29/] Petitioner has not shown that every state has multiple limitation periods for attacking adoption decrees as was the problem in cases following this Court's decision in Wilson v. Garcia, supra. This case does not present the difficulties inherent in the civil rights context where civil rights actions can be of a broad range and not necessarily analogous to state actions. 25 U.S.C. Sec. 1914 envisions only one sort of action -- an attack on an adoption decree.

[30/] "[T]he provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations." H.R. No. 95-1386, 95th Congress, 2d Session, 17 (1978), reprinted in 1978 U.S. Code, Congressional and Administrative News at page 7540.

situations involving fraud or duress. 25 U.S.C. Sec. 1913(d). [31/] Neither fraud nor duress are present here. T.N.F., 781 P.2d at 981.

As the Alaska Supreme Court reasoned:

> [I]t would be inconsistent to allow a collateral attack on a consent in violation of ICWA to be brought at any time but only allow collateral attacks on consents which are the product of fraud or duress within two years of the adoption decree. Fraud and duress are evils at least as serious as violations of the procedural protections contained in ICWA. A consent obtained in violation of Sec. 1913 of ICWA should not be more questionable than a consent obtained through fraud or duress. Since Congress clearly intended that state statutes of limitations would apply to actions pursuant to Sec. 1913(d) it is

[31/] Congress realized that state statutes of limitations would, at sometime, bar the vacation of adoption decrees even where consents to the adoptions had been obtained through fraud or duress. It therefore created a minimum two-year time limit for these special cases, or a longer time period if allowed by state law.

> logical to assume that state statutes of limitations also apply to Sec. 1914 actions. If Congress had intended to establish a minimum time for bringing 1914 actions, it would have mandated a statutory minimum as it did in Sec. 1913(d).

T.N.F., 781 P.2d at 979-80.

The Alaska Supreme Court found, in the record, a procedural problem not amounting to a jurisdictional defect [32/]

[32/] Petitioner asserts in her first question presented that the Alaska Supreme Court found the Petitioner's consent invalid ab initio, but nevertheless applied the state statute of limitations. The Alaska Supreme Court held, however, that:

> [T]he superior court in the case at bar had jurisdiction over the adoption when it issued its decree (footnote omitted). We do not equate a decree made without jurisdiction with a decree based on the consent allegedly made in violation of a non-jurisdictional provision of ICWA (footnote omitted).

T.N.F., 781 P.2d at 981.

or a denial of due process [33], and noted:

> As a matter of policy, both the two-year federal statute of limitations in Sec. 1913(d) and the one-year limitation in AS 25.23.140 recognize that at some point adoptions must become final.

T.N.F., 781 P.2d at 980. Application of the state statute of limitations is not inconsistent with federal policy. [34] Adoptive parents are not completely without protection under ICWA.

[33] T.N.F., 781 P.2d at 982. Petitioner had every opportunity to enforce her federal claim before expiration of the statute of limitations. Petitioner's argument that application of the state statute of limitations denied Petitioner access to a state court to remedy a violation of federal rights and extinguished her federal rights is unwarranted. Application of the state statute of limitations did not deny Petitioner access to a state court, it merely set reasonable time limits on her action.

[34] "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Robertson v. Wegmann, 436 U.S. 584, 593 (1978).

Since Petitioner did not raise any allegation of fraud or duress, the Alaska Supreme Court concluded that application of Alaska's state statute of limitations was appropriate. T.N.F., 781 P.2d at 981. The decision is entirely reasonable and does not conflict with any cases cited by Petitioner or with any provision in the Act.

2. EVEN IF PETITIONER'S SECOND QUESTION PRESENTED WAS OPEN FOR REVIEW, PETITIONER'S ARGUMENT IS BASED ON A MISINTERPRETATION OF THIS COURT'S PRIOR DECISIONS.

Petitioner states that Wilson v. Garcia, 471 U.S. 260 (1985), stands for the proposition that "[a] State statute of limitations period is borrowed only when federal law does not provide an analogous federal statute. . . ."

Petition at 17. Wilson v. Garcia does not so state. [35/]

The general rule is that "state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise." Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-4 (1966).

This Court has very recently explained that:

35/ Wilson, a civil rights case, involved the application of 42 U.S.C. Sec. 1988. This case does not. In any event, in Wilson, a state statute of limitations was borrowed, and, as such, is no authority for the proposition that Petitioner urges. This Court explained:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so (footnote omitted). In 42 U.S.C. Sec. 1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Act.

Wilson v. Garcia, 471 U.S. at 266-67 (1985).

> [A]pplication of a federal statute will be unusual, and "resort to state law remains the norm for borrowing of limitations periods."

Reed v. United Transportation Union, 109 S.Ct. 621, 625 (1989), citing from Del Costello v. Teamsters, 462 U.S. 151, 171 (1983).

This case does not present an exception to the general rule. This is not a situation where there is no obvious choice or no analogous state statute of limitations as in Del Costello, supra. The state statute is clearly analogous. Actions to vacate adoption decrees have long been a part of state litigation, and conversely, there is no general federal law of domestic relations. De Sylva v. Ballentine, 351 U.S. 570, 580 (1956).

In any event, Congress, in ICWA, expressly adopted a two-year statute of limitations relating to vacating

adoptions where consents were obtained by fraud or as a result of duress. Congress chose not to establish a time limitation for Sec. 1914 actions generally. [36/] Petitioner here seeks nothing less than judicial legislation [37/] on an issue that was neither raised at, nor decided by, the state court below.

36/ In Robertson v. Wegmann, 436 U.S. 584, 589 (1978), this Court found that issues relating to the survival of a civil action under 42 U.S.C. Sec. 1983 were not covered by federal law although survivorship provisions were contained in 42 U.S.C. Sec. 1986. This Court found that Sec. 1986 applied only to a specified list of wrongs not involved in the plaintiff's suit. Id. at 589 n.4.

37/ "That Congress did not provide a uniform limitations provision . . . is not an argument for judicially creating one. . . ." Autoworkers v. Hoosier Cardinal Corp., supra, 383 U.S. at 703.

B. DESPITE THE FACTUAL DISSIMILARITIES BETWEEN THE TWO CASES, THE RESULT REACHED BY THIS COURT IN HOLYFIELD AND THE RESULT REACHED BY THE ALASKA SUPREME COURT IN THIS CASE ARE CONSISTENT.

Blatant dissimilarities separate this case from Mississippi Band of Choctaw Indians v. Holyfield, 109 S.Ct. 1597 (1989) [38], yet the results reached by both this Court in Holyfield and by the Alaska Supreme Court in the instant case are consistent with the reasons behind Congress' enactment of ICWA.

This Court, in Holyfield, interpreted ICWA in light of "the object and policy" [39] of the statute. The Act was interpreted so as not to "nullify the

[38] In Holyfield, the Indian child's tribe opposed, rather than endorsed, the adoption and moved to vacate the adoption decree two months after it was entered. In Holyfield, the important placement provisions of ICWA, 25 U.S.C. Sec. 1915, were ignored, while in this case they were scrupulously followed.

[39] Holyfield, 109 S.Ct. at 1608.

purpose the Indian Child Welfare Act was intended to accomplish." [40/] In view of the purposes of the Act, and "because of concerns going beyond the wishes of individual parents," [41/] the Act was construed to further the goals of preserving Indian heritage and cultural identity. The result reached by the Alaska Supreme Court in this case has the same effect.

Petitioner's reading of Holyfield, as requiring total uniformity under ICWA, extending not only to definitions but to statutes of limitations, goes far beyond what the case says, and would be inconsistent with long-established cases of this Court. See discussion, supra at 17-27. Respondents do not believe, and

40/ Id. at 1610.

41/ Id. at 1609.

the Alaska Supreme Court did not believe [42/], that to be the intent of this Court in the Holyfield decision.

C. PETITIONER DOES NOT CONTEND THAT THE ALASKA SUPREME COURT'S DECISION CONFLICTS WITH ANY DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF ANY U.S. COURT OF APPEALS; AND IT DOES NOT.

Respondents believe that this case represents the first and only reported decision relating to the precise issues involved. It conflicts with no other decision of another state court of last resort or any U.S. Court of Appeals.

Petitioner's argument that there is likely to be confusion in the law as a result of the Alaska decision is based on an unlikely hypothetical case, which may

[42/] T.N.F., 781 P.2d at 908-81.

never occur. [43/] Review now would be premature.

D. THE ALASKA SUPREME COURT RESULT WAS EQUALLY CORRECT FOR THE REASONS SET FORTH IN THE CONCURRING OPINION OF JUSTICE COMPTON.

Both the majority and the dissenting justice in the Alaska Supreme Court recognized it was very unlikely that Congress had a surrogate parent arrangement, which created an Indian family, in mind when it adopted the Act. T.N.F.,

43/ Petitioner confuses statutes governing the withdrawal of consents to adoptions and statutes of limitations governing attacks on adoption decrees. The chance of an appeals court falling into the same confusion is extremely unlikely. The Alaska Supreme Court was not so confused, although Alaska has a statute relating to the withdrawal of consents to adoptions. See A.S. 25.23.070. Additionally, ICWA Secs. 1913(c) and 1913(d) include federal time limitations with regard to withdrawals of consents. In light of the Act itself, the Alaska Supreme Court's clear analysis, and this Court's recent decision in this area, Owens v. Okure, supra, the chance of borrowing state time limits as suggested by Petitioner is minimal, at best.

supra, Majority Opinion, 781 P.2d at 978, Dissenting Opinion, 781 P.2d at 985.

Justice Compton, to further the policies and purposes of ICWA, in view of the case before him, construed the term "parent" in ICWA [44/] to exclude non-Indian biological parents. He stated:

> What is significant is the principle [Petitioner] seeks to establish; a non-Indian may avail himself or herself of the protections of the Act, even when the result would be to stand the act on its head (footnote omitted). [Petitioner] was not without rights and remedies, for she had both under state law. In my view what she does not have are rights and remedies created especially for Indian people, when the principal [sic] she is seeking to establish inevitably would lead to results which would defeat the purposes of the Act.

[44/] 25 U.S.C. Sec. 1903(9) provides:

> "[P]arent" means any biological parent or parents of an Indian child. . . .

T.N.F., 781 P.2d 973, Concurring Opinion at 984. He reasoned that "[t]he clear implication is that the Indian Child Welfare Act should not be applied where its application is inconsistent with [the protection of Indian people]." Id. at 983.

E. THE RESULT REACHED BELOW COULD HAVE BEEN REACHED ON THE BASIS OF APPLICATION OF OTHER STATE LAW PRINCIPLES PERTINENT TO ACTIONS TO VACATE ADOPTION DECREES, WHICH ARE NOT PRE-EMPTED BY NOR INCONSISTENT WITH ICWA.

Petitioner alleges only that her consent was not given in front of a judge. [45/] She has not asserted that she

[45/] Sec. 1913(a) requires that a court certify "that the terms and consequences of the consent were fully explained in detail" and that the "parent," or "Indian custodian," "fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood." Congress was anticipating protecting an unsophisticated, possibly not even English-speaking parent of an Indian child. Petitioner is a white woman,
(continued...)

did not understand the simple, unambiguous consent that she signed. Her position is that 25 U.S.C. Sec. 1914 mandates vacation of the adoption decree automatically if consent is not given in front of a judge, even though consent was knowingly and voluntarily given.

However, Sec. 1914 of ICWA provides only that:

> [A]ny parent . . . may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Sections 1911, 1912, and 1913 of this title (emphasis added).

Sec. 1914 does not say that all petitions will be granted upon a showing of a violation. It allows for the filing of a petition. Sec. 1914 does not state specifically what grounds are sufficient

45/(...continued)
college educated, and fully conversant in English, which is her native language.

for invalidation, or set out timeliness rules or other procedures with regard to invalidation. Much is left to state law.

Sec. 1914 presumes that a court will exercise discretion and will consider the spirit and purpose of ICWA and the reasons for its enactment; will apply state law when it is not inconsistent with or pre-empted by federal law; and will carefully weigh and scrutinize the facts and circumstances before it. Substantial compliance and harmless error are principles that may apply. [46/] These

[46/] Harmless error and substantial compliance were raised by Respondents below, although not reached by the Alaska Supreme Court majority opinion. Brief of Appellees below pp. 22-29.

principles are inherent in federal and in state law. [47/]

The Alaska Supreme Court, and other state courts, have examined ICWA cases in light of these concepts, and have vacated or upheld custody proceedings, only after making this careful analysis. [48/]

47/ F.R.C.P. 61 provides:

> [N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for . . . setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

48/ The Alaska Supreme Court, in In the Matter of L.A.M., 727 P.2d 1057, 1061 (Alaska 1986), found that failure to comply with a notice provision of the ICWA would require reversal of an order terminating parental rights "unless the procedural violation was harmless . . . (emphasis added)." Id. at 1061. See also, In the Matter of the Adoption of Baby Boy L, 643 P.2d 168, 177 (continued...)

Certainly ICWA does not require blind and summary vacations of adoption decrees where the result would be to thwart the very purpose of the Act itself. If Congress had so intended, it could have so provided in Sec. 1914. It did not.

48/(...continued)
(Kansas 1982).

The California Court of Appeals in In re Junious M., 193 Cal.Rptr. 40, 44-46 (1983), made a determination first, as to whether a violation of the Act was prejudicial, before invalidating a termination of parental rights proceeding.

The court in In the Matter of S.Z., 325 N.W.2d 53, 55-56 (S.D. 1981), examined a failure to provide notice (to the Rosebud Sioux Tribe) precisely as provided for Sec. 1912(a) of the Act. The court held that the notice given was substantially in compliance with the statute, and, since no prejudice resulted, compliance was adequate although technically insufficient. See also, In Re Dependency of A.W., 765 P.2d 307, 311 (Wa. App. 1988).

F. ANY OTHER RESULT, GIVEN THE FACTS OF THIS CASE, WOULD RAISE GRAVE CONSTITUTIONAL QUESTIONS.

T.N.F. is just 1/64 Chickasaw Indian [49/]. On the basis of the child's Indian ancestry on her father's side, Petitioner, one non-Indian party to this proceeding, seeks to use ICWA to gain an advantage over the recipient of an Alaskan adoption decree, another non-Indian party to this case. An application of the Act that would have this effect is unconstitutional. [50/]

[49/] Due solely to the fact that Bruce Finney, who is 1/32 Chickasaw Indian, wrote to the Chickasaws in 1979 and received a Certificate of Degree of Indian Blood, T.N.F. meets the definition of "Indian child" under ICWA. 25 U.S.C. Sec. 1903(4).

[50/] The unconstitutionality of application of ICWA to these facts was raised by Respondents below. Brief of Appellees below, pp. 44-46. Respondents' challenge was centered on principles of federalism and the reach of Congress' power to legislate, and on the overbreadth of the statute in denying Respondents equal protection under the (continued...)

1. THE APPLICATION OF THE ACT PROPOSED BY PETITIONER WOULD EXCEED THE CONSTITUTIONAL LIMITS ON THE REACH OF CONGRESS UNDER THE INDIAN COMMERCE CLAUSE.

While Congress undeniably has broad powers to legislate Indian matters under the Indian Commerce Clause, U.S. Constitution, Art. I, Sec. 8, Clause 3, it simply has no power to legislate procedure for a state domestic relations matter between two non-Indian parties. Congress' powers are not without limits.

> As the power is incident only to the presence of the Indians and their status as wards of the government, it must be conceded that it does go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis . . . a prohibition . . . would become inoperative

50/(...continued)
due process clause of the Fifth Amendment. The Alaska Supreme Court found it unnecessary to reach the issue.

> when, . . . the Indians affected were completely emancipated from Federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state.

Perrin v. U.S., 232 U.S. 478, 486 (1914). [51/]

Petitioner is non-Indian. The child involved has less than two percent Indian blood. No one involved has ever lived on an Indian reservation or has received Indian benefits of any kind.

51/ See also, comments by the U.S. Department of Justice on Tenth Amendment constitutional concerns relating to the imposition of ICWA procedures where applicable state procedures are constitutionally sufficient.

> It seems to us that the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by Section 102.

H.R. No. 95-1386, 95th Congress, Second Session, 40 (1978), reprinted in 1978 U.S. Code Congressional and Administrative News at page 7563.

Bruce Finney is more Irish than Indian. Bruce and Sherry Finney are entitled to the protection of the laws of the State of Alaska. No federal interest is served by denying them that protection here. [52/]

2. THE STATUTORY DEFINITION OF THE TERM "PARENT" IN ICWA IS OVERBROAD AND WOULD DENY RESPONDENTS EQUAL PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT IF APPLIED AS PETITIONER PROPOSES.

Petitioner here is claiming extra protection under a race-conscious, remedial relief statute. She is white. The group which ICWA distinguishes and to which it grants preference, includes white parents if they happen to have children with any degree of Indian

[52/] Similar concerns were also raised in In the Matter of Adoption of T.R.M., 525 N.E.2d 298, 303-04 n.1 (Ind. 1988).

blood. [53/] Nothing in reason or in the legislative history of ICWA evidences past or present discrimination against white parents of Indian children, nor is there the slightest indication that extending extra protection to non-Indians would serve the laudable goals that Congress sought to achieve by enacting ICWA. [54/]

The classification of those singled out for protection under ICWA (Indian parents and non-Indian parents) is simply too broad. City of Richmond v. J.A.

53/ 25 U.S.C. Sec. 1903(9) provides that: "'[P]arent' means any biological parent or parents of an Indian child. . . ." Any "parent from whose custody such child was removed" is given the right to bring a Sec. 1914 action. 25 U.S.C. Sec. 1914.

54/ "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Morton v. Mancari, 417 U.S. 535, 555 (1974).

Croson, 109 S.Ct. 706 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980). A grant of special protection to the Petitioner here would deny Bruce and Sherry Finney equal protection under the law.

CONCLUSION

For all of the foregoing reasons, it is time that this litigation came to an end. As this matter now stands, this Court's decisions have been carefully followed, grave constitutional questions have been avoided, and the objectives of ICWA have been met. Respondents respectfully request that the Petition for Certiorari be denied.

RESPECTFULLY SUBMITTED this 22nd day of February, 1990.

TUGMAN, CLARK & RAY
Attorneys for Respondents

By Sarah J. Tugman
Sarah J. Tugman

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3 provides, in pertinent part:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . .

Article III, Section 2, Clause 1, provides, in pertinent part:

> The judicial Power shall extend to all Cases, . . . [and] -- to Controversies. . . .

Amendment V, provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

Amendment X, provides:

> Reserved Powers to States. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES

25 U.S.C. Sec. 1901 provides:

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an

alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. Sec. 1902 provides:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. Sec. 1903 provides, in pertinent part:

For the purposes of this chapter, except as may be specifically provided otherwise, the term--

(1) "child custody proceeding" shall mean and include--

. . .

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

. . .

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

. . .

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

. . .

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established; . . . .

25 U.S.C. Sec. 1913 provides, in pertinent part:

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

. . . .

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

25 U.S.C. Sec. 1914 provides:

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

25 U.S.C. 1915 provides, in pertinent part:

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

25 U.S.C. Sec. 1916 provides, in pertinent part:

(a) Petition; best interest of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to

the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

A.S. 25.23.060(a), at the time of the adoption proceedings, provided:

(a) The required consent to adoption shall be executed at any time after the birth of the child in the presence of the court or in the presence of a person authorized to take acknowledgments.

A.S. 25.23.070, at the time of the adoption proceedings, provided:

Withdrawal of consent. (a) A consent to adoption may not be withdrawn after the entry of a decree of adoption.

(b) A consent to adoption may be withdrawn before the entry of a decree of adoption, within 10 days, by delivering written notice to the person obtaining the consent, or after the 10-day period, if the court finds, after notice and opportunity to be heard is afforded to petitioner, the person seeking the withdrawal, and the agency placing a child for adoption, that the withdrawal is in the best interest of the person to be adopted and the court orders the withdrawal.

A.S. 25.23.140(b) provides:

(b) Subject to the disposition of an appeal, upon the expiration of one year after an adoption decree is issued, the decree may not be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.